United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

372A

No. 24694

UNITED STATES OF AMERICA,

Appellee,

v.

MARION C. BROOKS,

Appellant.

APPELLANT'S APPENDIX

THOMAS L. DELANEY, ESQUIRE
1625 Eye Street, N. W.
Suite 622
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED

SEP 2 1970

ROBERT M. STEARNS, Clerk

UNITED STATES :

vs. : Criminal Number 1394-66

MARION C. BROOKS :

O R D E R

Upon consideration of the Defendant's pro se Motion to Vacate Judgment, pursuant to 28 U.S.C. § 2255, and the Court finding that it considered the same matters when it denied defendant's motion for similar relief on October 9, 1968, it is by the Court this 1 day of September, 1970,

ORDERED, that defendant's motion be and hereby is denied.

Judge

September 1, 1970
(Date)

Petitioner 7

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

MARION C. BROOKS

VS. - CRIMINAL NUMBER 1394-66

UNITED STATES

NOTICE OF APPEAL

The Petitioner, MARION C. BROOKS, having filed a Motion to VACATE JUDGEMENT OR IN THE ALTERNATIVE, MODIFICATION OF PETITIONER'S SENTENCE, SO THE PETITIONER MAY UNDERGO A PSYCHOLDICAL EXAMINATION AND THE APPOINTMENT OF COUNSEL, PURSUANT TO TITLE 28, SECTION 1915 U.S.C., TITLE 28, SECTION 2255 U.S.C. In this U.S. District Court For The District Of Columbia, Respectfully filed this Notice of Appeal, For The U.S. District Court Of Appeals.

The Petitioner's Motion was denied on the 1st. Day of September, 1970 before the Honorable Judge Aubrey E. Robinson Jr.

Respectfully Submitted
(s) Marion C. Brooks
Box 25
Lorton, Va. 22079

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

vs. Crim. No. 1394-66

MARION C. BROOKS

ORDER

It appearing that the defendant has been permitted to proceed in this case without prepayment of costs,

It is this 10th day of September, 1970,

ORDERED that consideration for the appointment of counsel on appeal be and hereby is referred to the United States Court of Appeals for the District of Columbia Circuit, as authorized by the Judicial Council of this Circuit on October 12, 1962.

JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WASHINGTON, D.C.

MARION C. BROOKS
Petitioner

№24694

2619-70

CIVIL ACTION NO.

VS.

United States Court of Appeals
for the District of Columbia Circuit

CRIMINAL CASE NO. 1394-66.

UNITED STATES OF AMERICA
Respondent

FILED OCT 8 1970

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ROBERT M. STEARNS, Clerk

MOTION TO VACATE JUDGEMENT OR IN THE ALTERNATIVE, MODIFICATION OF PETITIONER'S SENTENCE, SO THE PETITIONER MAY UNDERGO A PSYCHOLGICAL EXAMINATION AND THE APPOINTMENT OF COUNSEL, PURSUANT TO TITLE 28, SECTION 1915 U.S.C., TITLE 28, SECTION 2255 U.S.C.

Comes now MARION C. BROOKS, the Petitioner, prose; being first duly sworn, accordingly to law, Respectfully moves this Honorable United States District Court to grant Petittioner's Motion for the reasons:

STATEMENT OF CASE

The Petitioner was charge with Robbery (under D.C. Code 22-2901) in criminal number case 1394-66.

The Petitioner pleaded not guilty in criminal case No. 1394-66. The Petitioner was trialed and founded guilty of Robbery by a jury on the 5th day of April 1967, before the Honorable Judge Aubrey E. Robinson Jr.,

The Petitioner was sentenced to a term of 5 to 15 (five to fifthteen) years on the 28th day of April 1967, by Judge Aubrey E. Robinson Jr.

The Petitioner states that at the time of arraignment and at the time of trial, he didn't have any means to employ counsel.

That this court appointed, Mr. Blaine P. Friedlander Esq., to represent the Petitioner.

That at the time of these proceedings, the Petitioner was a resident of Wash., D.C.

The Petitioner is now confined at the Lorton Complex, Lorton, Va. 22079.

STATEMENT OF FACTS

I. The counsel for Petitioner, Mr. Blaine P. Friedland, was ineffective and denied Petitioner of Due Process of Law.

2. The Petitioner requested to appointed counsel to file a motion for a Psychiatric and Psychological Examination at St. Elizabeth's Hospital for a mental competency evaluation before trial or for the possible criminal behavior or habits. Counsel declined to file such motion.

3. The Petitioner's assigned counsel toke it upon himself to diagnose the Petitioner's mental condition.

4. The Petitioner's assigned counsel didn't have any knowledge or imformation as to the Petitioner's Social, Physical or Mental conditions as well as his history before counsel made his judgement of the Petitioner's mental health.

5. The Petitioner's assigned counsel was ineffective and inadequate to make such a profeesional diagnosic examination himself of the Petitioner's mental condition.

6. The Petition's assigned counsel made no investigation as to the Petitioner's request for observation at the St. Elizabeth's Hospital.

7. Because of the negligence of the Petitioner's assigned counsel and of his poor judgement of the Petitioner's mental condition, the Petitioner is confined at the Lorton Complex, which does not provide adequate psychiatric and psychological care.

8. Because of the negligence of the Petitioner's assigned counsel to file motion for examination as to the Petitioner's mental condition, the Petitioner was arrested on his release on bail approximately two (2) and a half months later in the State of Maryland for the crimes of: (1. Assault with intent to murder, 2. Assault and Battery, 3. Carrying a concealed weapon, and 4. Conspiracy to Robbery with a dangerous and deadly weapon.)

9. Upon the Petitioner's confinement in the State of Maryland, the Petitioner was sent to the Paturent Institution at the request of the Trial Judge for examination as a "Defective Delinquent" under Article 31-B, Annotated Code of Maryland. See Petitioner's Exhibit No. 1, on Page 5 · Attract hereto.

10. The Petitioner was evaluated by the staff of the Patuxent Institution and was founded to be a Defective Delinquent. Read Exhibit No. 1, on Page 5 · Att. hereto

11. The mere fact that the Petitioner was evaluated and founded to be a "Defective Delinquent", by the staff of that Institution, in Jessup, Maryland points out the "Ineffectiveness" of Petitioner's assigned counsel in diagnosing the Petitioner's mental condition.

12. SEE Petitioner's Psychological Report and Evaluation of his mental condition in Exhibit No. 2, on Page 6 · Attract hereto.

13. The facts concerning Petitioner's mental health plainly show the Petitioner is suffering from a disease. Read Petitioner's Exhibit No. 1 and 2.

14. The Petitioner's evaluation as a "Defective Delinquent" came about through a thorough examination given by Dr. Harold M. Boslow, M.D., Director, Patuxent Institution, Mr. Junesik N. Yong, M.D., Psychiatrist III, Mr. Louis M. Florenzo, Psychologist and Domingo C. Sorongon, M.D.

II

15. Tthe Petitioner states that he was confinded in the Patuxet Institution for about (21) months before the Petitioner was transfer to the custody of the Department of Correction, Baltimore, Maryland.

16. The Petitioner states that his removal from Patuxent Institution was do to a Writ of Habeas Corpus because the said Institution didn't apply with section 8 of Article 31-B of the Annotated Code of Maryland. SEE PETITIONER'S Exhibit number 3 on page 7 attract hereto.

17. The Petitioner states that his removal from the Patuxent Institution was a " Critical " part of his Life. The Petitioner states that the Patuxent Institution provide adequate Phychological care inwhich the Petitioner needed for his return to Social, mentally sound as well as geting help for mentally sickness or mentally habits of criminal activitys.

18. The Petitioner states that under the Defective Delinquent Statute, Article 31-B, Annotated Code of the Public General Laws of Maryland. The Petitioner is a " Defective Delinquent " and should be confined in a mental institution.

19. The Petitioner states that he are mentally sick and should be confined in St. Elizabeth Hospital or any appropriate Mentally Hospital that provid adequate Phychiatric care and treatment for Petitioner.

CONCLUSION

I, Marion C. Brooks, respectfully states that my trial counsel's failure to have filed a pre-trial Motion For me to under go a Psychiatric and Psychological Examination violated my Constitutional Right to Due Process of Law and has thereby rendered his representation as my trial counsel, ineffective to the point of depriving me of counsel under the Constitutional Sixth (6) Amendment right, and a denial of Due Process of Law under the Constitutional Fifth (5) Amendment rights.

That as a result of all of the above allegations, the Petitioner was deprived of properly assistance of counsel and therefor not being able to properly evaluate and defend his self and case.

Wherefore, the Petitioner request this Honorable Court to grant him the appropriate relief and the appointment of counsel.

The Petitioner, MARION C. BROOKS hereby certified that he is an indigent prisoner, untrained in the science of Law and without Legal counsel and is finanical unable to defray and costs involved in proceeding this Motion.

(s) Marion C. Brooks
Respectfully Submitted

III

AFFIDAVIT

The Affiant MARION C. BROOKS, having been duly sworn according to Law deposes and states that he has read the foregoing Motion To Vacate Judgement Or In The Alternative, Modification Of Petitioner's Sentence and that the facts contained therein are true to the best of his knowledge and belief.

(s) Marion C. Brooks

CERTIFICATE OF SERVICE

I hereby certify that three (3) copys of the foregoing Motion For VACATE JUDGEMENT OR IN THE ALTERNATIVE, MODIFICATION OF PETITIONER'S SENTENCE was mailed postage paid, to the United States District Court, For The District of Columbia, Washington, D.C. on this 21 day of July 1970.

Subscribed and sworn to before me this 21 day of July 1970.

(S) _____
Notary Public

My Commission Expires
My Commission Expires March 22, 1971

Month Day Year

IV

CA 2619-70

PETITIONER'S EXHIBIT NUMBER... I

EXAMINATION

members of the advisory board shall receive a per diem payment for every day spent in the duties of the board. The advisory board shall confer with the staff of the Institution, and with the board from time to time, and shall give to the Institution a general consultative and advisory service on problems and matters relating to its work.

(b) No surgical operation shall be performed as treatment of any defective delinquent except as authorized by the approval of the advisory board and also by the written consent of the defective delinquent, his nearest relative, or the order of the court.

PETITIONER'S EXHIBIT NUMBER... I

DEFECTIVE DELINQUENTS

SECTION 5. DEFINED.

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

SECTION 6. REQUESTS FOR EXAMINATION.

(a) A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed before June 1, 1954, shall be subject to this article with the same effect as if said crime or offence had been committed after June 1, 1954, if after said date such person is adjudged to have broken the terms of any parole or probation on which he has been released from said sentence.

(b) The request for such examination may be made by the Department of Correction or by the State's attorney or as-

VI

(C.F.) 2619-70

PETITIONER'S EXHIBIT NUMBER... II

PETITIONER'S EXHIBIT NUMBER... II

March 27, 68 to Jan. 5, 1970

CASE OF : MARION BROOKS, CUR NO. D-2108, AGE 24
CHARGE : CONSPIRACY TO COMMIT ARMED ROBBERY
REFERRED BY : MONTGOMERY COUNTY CIRCUIT COURT, THE HONORABLE JUDGE LEVINE
EXAMINED BY : (PATUXENT INSTITUTION, JESSUP, MARYLAND, JUNE 18, 1968

IMPRESSION :

Marion Brooks is a twenty-four year old, single, Negro male, who was charged with Conspiracy to Commit Armed Robbery in the Montgomery County Circuit Court. On February 19, 1968, he was sentenced by Judge Levine to five years from March 28, 1967. He was transferred to (Patuxent Institution) on March 27, 1968, for evaluation.

The patient was born on January (8), 19 1944, in Wash. D.C., [redacted]. Reportedly, his early developmental years were uneventful. Reportedly, he was expelled for behavioral reasons from a seventh grade adjustment class at a junior high school in October, 1956, prior to his commitment to a local Welfare Department's Juvenile Institution. Upon his release to the community in 1960, he enrolled in Stuart Junior High School from where he was transferred to Jefferson Junior High School, all for continuing disciplinary reasons. He was then placed in Boys' Junior-Senior High School in an ungraded class, from where he quit in April, 1961. His school record reflects continuous behavioral problems with school authorities for reasons that he would fight other students and would refuse to obey his teachers. He worked in sundry labor jobs, the longest one lasting about six months.

This patient's first difficulty with the law occurred as early as 1957, at the age of fourteen, when the patient was charged with Housebreaking. He was placed on juvenile probation. In November, 1958, he was charged with Grand Larceny and he was committed to D.C. General Hospital for observation. He was then committed to Cedar Knolls being released in September, 1960. On January 18, 1962, as an adult, he was charged with Robbery in D.C. (subject and two youths involved in holdup robbery with a gun), and Juvenile Court waived jurisdiction. The patient was acquitted of this charge and two co-defendants were given prison sentences. On September 6, 1962, he was charged with Housebreaking but no disposition has been entered. On June 28, 1964, he was charged with Carrying a Dangerous Weapon, Pistol, and he was sentenced to thirty days in the Washington, D.C. Jail. On July 29, 1964, he was charged with Parole Violation and November 23, 1966, his sentence was terminated. On November 6, 1966, he was charged with Robbery Holdup and according to the patient, he was released on bond. The next offense is the current one.

Physical and laboratory examinations done at (Patuxent Institution) on March 27, 1968, indicates that they are essentially within normal limits. Electroencephalogram done on May 22, 1968, indicates in its comments:

"This is a low voltage, normal record for age."

Psychological examination done on June 27, 1968, indicated in its summary:

"In summary, this patient, of dull-normal intelligence, is an immature, emotionally deprived, poorly motivated individual with few internal recources to control his destructive acting out. He is self-centered and hedonistic, and gives little thought to the consequences

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CASE OF : MARION BROOKS, CUR NO. D-2103

[illegible] (Continued)

of his behavior. He shows no remorse for harm he has
done to others. He is thus a danger to others and meets
the definition of a Defective Delinquent.",

During the psychiatric examination his attitude was surly and he was
only superficially cooperative. He was defensive and guarded and there were
inconsistencies between his statement and his official record. He spoke
relevantly and coherently and there were no psychotic ideations elicited.
He denied having had any ideas of reference. His thinking was very concrete
and projective. He tried to deny, rationalize or minimize his basic problems.
He was totally unable to interpret any proverbs. He lacked insight into his
basic problems and his judgment was considered poor.

It was the opinion of the staff of Patuxent Institution that this patient
fulfills the requirements of being a Defective Delinquent and it is therefore,
recommended that he be committed to Patuxent Institution for confinement and
treatment.

HAROLD M. BOSLOW, M.D.
Director, Patuxent Institution

H.M.B:[illegible]:bak

[illegible], M.D.
Psychiatrist III

Louis M. Florenzo
Psychologist

Domingo [illegible] Sorengon, M.D. /mck

CASE OF : MARION BROOKS, CUR NO. D-2101

IDENTIFYING DATA:

Marion Brooks is a twenty-four year old, single, Negro male, native of Augusta, Georgia, who was charged with Conspiracy to Commit Armed Robbery in the Montgomery County Circuit Court. On February 19, 1968, he was sentenced by Judge Levine to five years from March 28, 1967. He was transferred to Patuxent Institution on March 27, 1968, for evaluation.

CURRENT OFFENSE:

a. PATIENT'S VERSION:

The patient denied that he was involved in the current charge. When asked to elaborate on the charge, he stated that on March 28, 1967, he was arrested in Eastern Avenue in Northwest Washington, with two of his partners, for the reason that "we are supposed to have conspired to commit a robbery of a motel". According to him, we were "just riding" and when "we had just backed up getting ready to come down, police approached and started shooting".

b. STATE'S VERSION:

"On 3/28/67 at approximately 4:36 A.M., a Police Officer while on stationary patrol at Eastern Avenue and 13th Street, received a radio call reporting three suspicious looking males operating a late model Pontiac and attempting to enter the offices of the Inn Town Motor Motel, located at 8001 13th Street in Silver Spring, Maryland. The officer responded to the motel and found the vehicle and its occupants had left the scene. A lookout was issued and the officers stationed themselves at the motel, and almost immediately, observed the vehicle and its occupants proceeding west on Eastern Avenue to the alley located to the rear of the motel, where the operator then parked the vehicle. The three subjects were next seen by the officers walking south on 13th Street away from the office of the motel. At that time, they ran to the parked vehicle and entered it. The Police placed their vehicle in such a position so as to obstruct the exit of the subjects from the alley. The subjects then drove their vehicle at the Police vehicle at a high rate of speed. One of the subjects was holding a revolver in his hand, and at that point, the officer began firing and the subjects continued to race directly at him. The operator of the vehicle then lost control of the car and collided with the parked vehicle owned by Antoine O. Kehishian of 8020 Eastern Avenue, causing an estimated $1000.00 worth of damage to the vehicle operated by the defendants, and $1000.00 damage to the vehicle owned by Kehishian. Subsequently, the vehicle of the defendants was searched and weapons were found under the seat. The defendants were removed from the vehicle and transported to the Police Station where they were advised

of their rights. One of the defendants, William Boddie, suffered a gunshot wound, which was inflicted by Officer Smith."

PAST OFFENSES AND INSTITUTIONAL ADJUSTMENT:

a. PATIENT'S VERSION:

When asked of the past offenses the patient gave the following version which he more or less read from a paper that he brought with him. In 1957, as a juvenile, he went back and forth to receiving home several times "mainly for Breaking and Entering". During the later part of 1957, he was arrested for Housebreaking and Grand Larceny and was sent to D.C. General Hospital for observation. He stayed there seven weeks and left in January, 1958, to go to the receiving home from where he was transferred to Cedar Knoll, Maryland Children's Center. He was discharged from the Center in September, 1960. On January 18, 1962, he was arrested for Robbery. He denies this charge and states "they say I robbed somebody". He was sent to the receiving home and then was transferred to the jail and finally was acquitted of the charge. In September, 1967, he was arrested for Housebreaking and in November, 1967, he was sentenced to six years to Youth Center, Lorton, Virginia. He left this Center on June 3, 1964, on parole and on June 29, 1963, he was arrested for carrying a Dangerous Weapon (starter pistol according to the patient). After serving thirty days in jail he was sent back to the Youth Center since this constituted the violation of parole. He was re-paroled on April 20, 1966, and in November, 1966, he was arrested for Robbery. (He states that he "pulled an armed robbery on a D.C. cleaners establishment".) He received five to fifteen years sentence and on December 23, 1966, he was released on bond. He was then arrested for the current charge.

b. OFFICIAL VERSION:

A report from the Youth Center, Department of Corrections, D.C. indicates that on June 17, 1957, at the age of thirteen, the patient was charged with Housebreaking (subject and three youths entered an apartment and stole some jewelry), and was placed on juvenile probation. On November 21, 1958, he was charged with Grand Larceny (subject and two youths broke into an auto and stole property valued at $332) and was committed to D.C. General Hospital for observation. Diagnosis was "Character Disorder" and he was committed to Cedar Knolls, being released in September, 1960. On January 18, 1962, as an adult, he was charged with Robbery in D.C. (subject and two youths involved in holdup robbery with a gun), and Juvenile Court waived jurisdiction. The patient was acquitted of this charge and the co-defendants were given prison sentences.

In addition to the above charges the following charges have been entered in the F.B.I. record. On September 6, 1962, he was charged with Housebreaking but no disposition has been entered. On June 23, 1964, he was charged with Carrying a Dangerous Weapon, Pistol, and he was sentenced to thirty days in D.C. Jail. On July 28, 1964, he was charged with Parole Violation and on November 23, 1966, his sentence was terminated. On November 8, 1966, he was charged with Robbery Holdup, but no disposition has been entered. On March 28, 1967, he was charged with Conspiracy to Commit Armed Robbery, Assault with Intent to Threat and Kill Police Officer. On April 4, 1967, he was charged with Robbery and on November 9, 1967, he was held for U.S. Marshal. On March 1, 1968,

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CASE OF : MARION BROOKS, CDR NO. D-2100

He was charged with Conspiracy to Commit Armed Robbery and was sentenced to five years.

FAMILY HISTORY:

Marietta Brooks, the patient's mother, was born on February 11, 1923, to Henry and Christine Sanders in Augusta, Georgia. She is the oldest of seven children and described to have had a happy childhood. Her parents separated when she was eleven months old. Two children were born of her mother's first marriage. Her mother remarried, when Mrs. Brooks was eleven years old, and five children were born out of this union. She indicated that she had all the necessities of life in her childhood, with few luxuries. Her stepfather, James Rivers, has been described as a wonderful person with whom she had formed meaningful relationship. There is quite a difference in ages between Mrs. Brooks and her siblings and step-siblings. She, therefore, assumed the role of mother with them. She completed high school. She met Mr. Charles Brooks, the patient's father, at the age of fourteen, through some friends. She courted him for a period of one year and married at the age of fifteen. She described her married life as "rugged". She described her husband as a heavy drinker and not a good provider. He did not, according to the mother, form any close relationship with his children. Seven children were born out of this union, of which six are living. The couple separated in 1965 because of their conflicts and arguments.

The mother has been employed as a maid by Georgetown Theater, 1351 Wisconsin Avenue, N.W., Washington, D.C., for the last seventeen years. She drinks socially and has never experienced any nervous disorder. She has, however, a high blood pressure condition.

Mr. Charles Brooks, the patient's father, was born September 25, 1919, to Albert and Hattie Brooks, in Augusta, Georgia. He is the third of four children. According to Mrs. Brooks, her husband had a close relationship with his mother because his father was a fireman and was usually away from home. Mrs. Brooks was not aware of her husband's relationship with his siblings, with the exception that he always seemed to be afraid of them. Mr. Brooks is reported to have completed seventh grade. He has been employed as a mail handler for the Washington Terminal Union Station for the last twenty years. Mrs. Brooks has to work to help the family as Mr. Brooks failed to support the family due to his drinking habit. He was described to have no criminal record, having not experienced any nervous breakdowns.

2. Charles Brooks, Jr., the patient's brother, was born May 27, 1939. He has two years of college education and is currently employed as a clerk in the post office in Washington, D.C. He is divorced and has no children. He is living at 38 Galveston Street, S.W., Washington, D.C.

2. Robert Brooks, the patient's brother, was born June 3, 1941. He finished eleventh grade and is employed as a kitchen helper in Billy Martin's, Wisconsin and M Streets, N.W., Washington, D.C. He lives with the mother.

3. Richard Brooks, the patient's brother, was born September 11, 1942. He completed high school and is employed as a manager in George's Pot Shop, Riverdale,

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CASE OF : MARION BROOKS, CUR NO. D-2100

Maryland. He lives with the mother.

4. The patient.

5. Christine Brooks, the patient's sister, was born December 28, 1944. She completed high school and is unemployed at present. She has one two months old son, born out-of-wedlock. She lives with the mother.

6. Marjorie Smith, the patient's sister, was born June 5, 1946. She completed high school. She is separated from her husband, has a four months old boy, and lives with the mother. She is currently employed by Burgman's Laundry, in Washington, D.C.

PERSONAL HISTORY:

a. BIRTH AND EARLY DEVELOPMENT:

The patient was born on January 8, 1944 in Washington, D.C. Reportedly the mother had high blood pressure during the pregnancy and also suffered from shortness of breath during the last three months of the pregnancy. According to the mother, the patient was an eight months baby. The patient had the normal childhood diseases and had no history of biting nails or enuresis.

b. RELIGION:

The patient states that he does not attend church and that he does not believe in any religion. A report dated August 29, 1964, by the Youth Center, Lorton, Virginia, indicates that the patient stated that he was a registered Baptist.

c. SCHOOL HISTORY:

According to the patient, he left school in tenth grade and he never failed any grades. He admits to have had "problems here and there" but states that he got along alright with students and teachers. He stated, however, that he attended six or seven different schools and when asked for the reason, he stated "seems like I was a problem at school, I kept getting transferred". Reportedly he was expelled for behavioral reasons from a seventh grade adjustment class of a junior high school in October, 1958, prior to his commitment to the local Welfare Department's Juvenile Institution. Upon his release to the community in 1960 he enrolled in Stuart Junior High School, from where he was transferred to Jefferson Junior High School, all for continuing disciplinary reasons. He was then placed in Boys' Junior-Senior High School, an ungraded class, from where he quit in April, 1961. His school record reflects continuous behavioral problems through school authorities for reasons that he would fight other students and would refuse to obey his teachers.

d. WORK HISTORY:

According to the patient, he worked at George Washington University cafe as a kitchen helper from November, 1960, to July, 1961. He then worked for Washington Country Club Golf Course for two weeks in August, 1961. During the months of November and December, 1962, he worked as a messenger for Joe-Louse

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CASE OF : MARION BROOKS, CUR NO. D-2100

Blueprint Company. In September, 1962, he worked at Hall's Restaurant for about a week. From May 10, 1966, to November 8, 1966, he worked at the Smithsonian Institute History and Technology Department, as a custodial. He earned $2.12 per hour and worked here until he got arrested for the robbery charge.

c. MILITARY HISTORY:

None.

d. SEXUAL AND MARITAL HISTORY:

According to the patient, his first heterosexual relationship occurred when he was nine years old with a seven years old girl, "playing mother and father". He has been having "occasional relationships" since then and has not had any steady girl friend. He masturbates two or three times a day while under incarceration but states that he does not masturbates on the outside because "there is no need to". He denies having had any homosexual relationships.

e. HOBBIES AND INTERESTS:

He likes to play all kinds of sports. Otherwise, he states that he does not have any special hobbies.

f. MEDICAL HISTORY:

The patient states that he has not had any serious illness or accidents. He admits to drinking "occasionally" but stated that he would drink half a pint of Booth's gin in the evening. Throughout the day he drinks beer. He claims that he has been drunk twice "in my whole life". He has been smoking since age thirteen and currently smokes about fifteen cigarettes a day. He denies having used any pep pills or narcotics.

g. PSYCHIATRIC HISTORY:

The following report has been submitted by the Youth Center, Lorton, Virginia, Department of Correction, D.C.:

> "This youth has not been involved in any formal program of therapy due to his negative and hostile feelings in this regard. Upon his return to the Youth Center, he was found to be quite hostile and unrealistic in his appraisal of the institution and the intentions of others. He was not then amenable to psychotherapy. As recent as April 20, 1965, an attempt was made to get him in therapy, and he agreed to a program change to this effect. He was taken into individual therapy on a weekly basis with one of the staff psychologists. Shortly after the therapy commenced, he was placed in the Control Cells. Upon his release, he did not resume therapy sessions and was later discontinued after stating that he did not want therapy."

PHYSICAL AND LABORATORY EXAMINATIONS:

Physical and laboratory examinations done at (Patuxent Institution) on March 27, 1968, indicated that they are essentially within normal limits.

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C. OF : MARION BROOKS, CDC NO. D-2100

Electroencephalogram done on May 22, 1968, indicates in its comments:

"This is a low voltage, normal record for age."

PSYCHOLOGICAL EXAMINATION:

Psychological examination done on June 17, 1968, indicated in its summary:

"In summary, this patient, of dull-normal intelligence, is an immature, emotionally deprived, poorly motivated individual with few internal resources to control his destructive acting out. He is self-centered and narcissistic, and gives little thought to the consequences of his behavior. He shows no remorse for harm he has done to others. He is thus a danger to others and meets the definition of a Defective Delinquent."

MENTAL STATUS:

During the psychiatric examination his attitude was surly and he was only superficially cooperative. He was defensive and guarded and there were inconsistencies between his statements and official record. He spoke relevantly and coherently and there were no psychotic ideations elicited. He denied having had any ideas of reference. His thinking was very concrete and projective. He tried to deny, rationalize or minimize his basic problems. He was totally unable to interpret any proverbs. He lacked insights into his basic problems and his judgment was considered poor.

COURSE IN PRESENT INSTITUTION:

This patient has not received any infractions or incidents reports of negative behavioral nature to date.

PSYCHIATRIC DIAGNOSIS:

Sociopathic Personality Disturbances, Antisocial Reaction.

RECOMMENDATION:

It was the opinion of the staff of (Present Institution) that this patient fulfill the requirements of being a Defective Delinquent and it is therefore, recommended that he be committed to (Receiving Institution) for confinement and treatment.

mm:bnk

VII

CA 2619-70

FILED

SEP 1 1970

ROBERT M. STEARNS, Clerk

PETITIONER'S EXHIBIT NUMBER... III

VII

ETITIONER'S EXHIBIT NUMBER... III

SECTION 8. HEARINGS.

(a) If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) The hearing for determination of defective delinquency shall be held no less than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in Section 5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury.

SECTION 9. SENTENCE.

(a) If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said conviction as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of Section 688 of Article 27 of the Code.

stop here.

Delivered to U.S.C.A. by District Court with Exhibits 71/a + docket entries

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24694

MARION C. BROOKS

VS.

UNITED STATES OF AMERICA

CRIMINAL CASE NO. 1394-66

OK WK

SPECIAL MEMORANDUM TO THE UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA.

SUBJECT : Notice of Appeal in Criminal Number 1394-66, Motion to vacate judgement, or in the alterative, Modification of Petitioner's sentence, so the Petitioner may undergo Psycholgical Examination and the appointment of Counsel, Pursuant to Title 28, section 1915 U.S.C., Title 28, section 2255 U.S.C.

PURPOSE : Full panoply of the relevant protections which due process guarantees in Criminal as well as Civil proceedings.

Safeguards which are fundamental rights and essential in considering Motions of relevant, important to one's life, liberty or property.

AS THE BASIS FOR THIS MEMORANDUM, THE PETITIONER STATES THAT:

I . The problems posed in this case can be more precisely formulated and sharply brought into focus if the allegations and facts in this case is probed into open court.

II The Honorable Judge Aubrey E. Robinson in his Order dening Petitioner's Motion, considered a petition that was filed in the U.S. District Court for the District of Columbia, October 9, 1968 in which the Judge stated that the motion was, or similar as the one that he denied September 1, 1970. The one that was filed October, 1968 was a Petition for Relief on the grounds that his assigned Counsel was"Incompetency". The one that was filed September, 1970 was a Petition for the Vacate of Judgement for the purpose of a Psycholgical Examination in which the Petitioner was denied because of the "Ineffective" of assigned Counsel.

III. The Honorable Judge Robinson denied the Petitioner the right to Counsel in which was very important to Petitioner and care. The Petitioner is a Layman with know knowledge of Law, and to have denied the Petitioner the right to assistance of Counsel before denied the Petitioner's Motion were, Unconstitutionally depriving Petitioner of a fair and considerable ruling under the Sixth and Forteenth Amendments of the United States Constitution.

IV. The Petitioner would like to call to the Court's attention to Public Law No. 210-71st. Congress; An act to Establish a Hospital for "Defective DELINQUENTS", the Petitioner's Motion was based on he being a Defective Delinquent. Exhibits was attract to Motion, verifing the contentions in Public Law No. 210.

Wherefore, Petitioner Respectfully prays this Court of Appeals to grant him relief as this Court may deem appropriate and the appointment of Counsel.

Respectfully Submitted;

AFFIDAVIT

The affiant MARION C. BROOKS, having been duly sworn according to Law deposes and states that he has read the foregoing Motion and that the facts contained therein are true to the best of his knowledge and belief.

(s) Marion C. Brooks

CERTIFICATE OF SERVICE

I herety certify that three (3) copys of the foregoing Notice of Appeal and special Memorandum to the United States Court of Appeals for the District of Columbia was mailed postage paid, to the United States District court, for the District of Columbia, Washington, D.C. on this 8 day of Sept 19 70.

Subscribed and sworn to before me on this 8 day of Sept 1970.

(S) [illegible]
Notary Public

My Commission Expires

month day year

My Commission Expires March 14, 1971

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES :

vs. : Criminal No. 1394-66

MARION C. BROOKS :

O R D E R

Upon consideration of Defendant Marion C. Brooks' Application for Review of Sentence and for Reduction of Sentence, and the Court finding that said Application is untimely under Rule 35 of the Federal Rules of Criminal Procedure, and the Court finding further that it considered many of the same matters now raised when it denied Defendant's Motion for Release under Title 28, United States Code, Section 2255, on October 9, 1968, it is this 10th day of February, 1969,

ORDERED that Defendant's Application for Review of Sentence and for Reduction of Sentence be and is hereby denied.

Aubrey E. Robinson, Jr.
Judge

February 10, 1969
(Date)

ASSIGNMENT COMMISSIONER
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D. C. 20001

January 31, 1969

Judge Robinson

Filed In Proper Person

Defendant: Marion C. Brooks

Criminal No. 1394-66

Motion: Application for review of sentence and reduction of sentence.

PLEASE RETURN TO THE ASSIGNMENT OFFICE.

Petitioner

In The United States District Court For The District of Columbia

FILED
JAN 23 1959
ROBERT M. STEARNS, Clerk

Marion C. Brooks
Petitioner

-Vs-

United States of America
Respondent

Criminal No. 1394-66

Application For Review of Sentence and The Reduction of Sentence

The Petitioner, Marion C Brooks respectfully prays to this Honorable Court of the District of Columbia to grant this Application For Review of Sentence and the Reduction of Sentence on the merits of the matter set forth therein.

Statement of Case

1.) The Petitioner was chaged with Robbery in Criminal Number 1394-66.

2.) The Petitioner pleaded not guilty and was tealed and found guilty of robbery, April 5, 1967, by the Honorable Judge Aubrey E. Robinson, Jr.

3.) The Petitioner wee sentenced to five to fifteen years on the 28th day of April 1967

Issues

As Grounds for this Application, the movant states:

I

That the Honorable Judge Aubrey E. Robinson, sentenced the Petitioner to five to fifteen years because of the succounding Circumstances

(A) That the Petitioner was granted personal bond after his arrest Nov. 8, 66

(B) That the Petitioner was arrested in Maryland for assault and conspiracy to rob, approximately three month after his release on personal bond.

II

That the Petitioner states that the Honorable Judge discrimination agaist the Petitioner because of the two statement above and because the Petitioner was indicted for Unauthorized Use of a motor Vehicle and Interstate Transportation of a Motor Vehicle.

III

The Petitioner futher states that the Probation Office discrimination agaist the Petitioner because:

(A) He was the same Probation office that interview the Petitioner in 1962 and had the Petitioner confined to the Youth Center under 5010-B.

(B) That the Probation Office is the same Probation office that was appointed to supervise the Petitioner while on parol. The Petitioner reported to the Probation office every month

to turn in his monthly reported, which was very good. The Petitioner asked his Probation office to put him in therapy class weekly or individual therapy. The request for therapy was denied.

IV

The Petitioner states that the Probation officer's Probation report was of the past not of the present because of the reasons stated below.

1. Assigned Probation Office failed to take sufficient time to prepare the probation report.
2. Failure of assigned Probation Office to interview character witnesses and the people the Petitioner worked for.
3. Probation Office interview the Petitioner for about seventeen (17) minutes and talked about the Petitioner present in the States of Maryland The Petitioner was not trial at that time but the Probation Office found the Petitioner guilty in his mind. The Petitioner was told by the Probation officer his feeling about the matter and that there wasn't any doubt in his mind that the Petitioner should be confined for the rest of his life in Laeton.
4. Assigned Probation officer was prejudice against the Petitioner when he was arrested in Maryland for conspicacy to rob. ect.,

V

The Petitioner states that he was working at the Smithson Institute, History and Technology Museum from May 10, 1966 until the Petitioner

was arrested November 8, 1966.

VI

The Petitioner was release on personal bond with couditions: 1) That he report to police depactment Numberten everyday between 6 o'clock P.M. and 8 o'clock, which the Petitioner did. 2) That the Petitioner work. which the Petitioner did. 3) That the Petitioner stay in his home from 9 o'clock P.M. until 6 o'clock A.M. in which the Petitioner did.

VII

The Petitioner state that he are now doing five (5) years in the state of Maryland for the charge of Conspiracy to commit Robbery. The charge are on Appeal.

VIII

The Petitioner futher state that he are in the Patuxent Institution. Jessup. Maryland and the Psychiatric Diagnosis is: "Sociopathic Personality Disturbances, Antisocial Reaction".

IX

The Petitioner states that he are at the point of having a mental breakdown behind the pressures of the 5 to 15 yeas. The Petitioner Appealed the judgment and sentence of his case but the Court of Appeal affirmed it, The Petition filed a Petition for Relief, September 30, 1968, it was denied by the same judge that trail and sentenced the, Petition, Judge Aubrey E.

Robinson, Jr of the U.S. District Court for the District of Columbia.

X

The Petitioner states as he have stated in the beinging, he didn't commit the crime of robbery in criminal case number 1394-66.

Conclusion

As a result of all of the above statements and allegations, the Petitioner respectfully prays to this Honorable Court to grant him a time cut and or place it under one of the Statute of the Youth Correction Act. A person can be guilty of a crime but not guilty of breaking the Law. "There isn't know Law that said a person can't put up a billfold that are Lying in the street." but it is agaist the Law to Keep the billfold when you Know moments Later that the billfold were involved in a robbery.

The Petitioner would also like to call to the attention of the Court the discrimination remarks his Court assigened counsel make at the opening statement on behalf of the defendant at the beinging of his trial April 5, 1967 (Tr. 16) "We hope to pesuade you the (Petitioner) was the gentleman who committed this crime.

Respectfully Submitted

(S) Marion C. Brooks
Petitioner

P.O. Box 7...
Jessup ...

Affidavit

Post Office Box 700
Jessup, Maryland 20794

SS

Marion C. Bracki, being first sworn under oath, presents that I has subscribed to the foregoing Application and does state that the information therein is true and correct to the best of my knowledge and belief.

/s/ Marion C. Bracki
Affiant

Subscribed and sworn to before me this 20th day of January, 1965.

/s/ Clerk Register
Notary Public

My Commission Expires
June 3, 1965
month day year

Ates District Court for
District of Columbia
Washington D.C.

"Leave to file granted."

Marion C. Brooks
Defendant

-Vs-

United States of America
Respondent

Criminal No.
F I L E D-66
OCT 11 1968
2537-68
ROBERT M. STEARNS, Clerk

Amended Petition for Relief

Marion C. Brooks, Petitioner, makes this Court to grant him relief on the grounds states as follows:

Statement of Case

The Petitioner was charged with robbery in Criminal No. 1394-66. The Petitioner plented not guilty and was given and assigned counsel, Mr. Blair P. Friedlander, Esq. The Petitioner was trailed and found guilty of robbery, April 5, 1967 and was sentence before the Honorable Judge Aubrey E. Robinson, Jr on April 28th 1967 to not Less than five (5) nor more than fifteen (15) years. The Petitioner appealed the verdict, which was affirmed on the 22nd day of November 1967. The Petitioner states that his assigned counsel, Mr. Blair P. Friedlander was Legal uneducation and unexperience to represent the defendant in this criminal case. The Petitioner also states that Mr. Friedlander qualification is that of a civil Lawyer, Not a criminal Lawyer,

Issues

1) Assigned counsel failed to take sufficient time to prepare the case.

2) Failure of assigned counsel to visit and interview the Petitioner sufficiently and to explain the nature of the indictment.

3) Failure of assigned counsel to file motions for discovery, etc.

4) Failure of assigned counsel to obtain and offer real evidence.

5) Assigned counsel disregards of defendants instructions.

6) Incompetency of assigned counsel.

7) Assigned counsel was prejudice against the Petitioner when he was REARRESTED in Maryland for conspiracy to rob.

8) Failure of assigned counsel to interview witnesses in the case.

9) Failure of assigned counsel to investigate the Failure of the Police to advise Petitioner of his rights to an attorney, etc.

10) Assigned counsel would not file a motion for the Petitioner to be examined by a competency psychiatrist and psychologist.

11.1 Failure of assigned counsel to subpoena one of the Goverment witnesses that was very important to Petitioner's case.

12.1 Petitioner also states, that the assigned counsel conspired with the Goverment to convict the Petitioner.

That as a result of all of the above allegations and/or anyone of them the Petitioner was not able to properly evaluate and defend his case.

That as a result of the above facts the Petitioner was deprived of his rights under the United States Constitution and the Amendments thereto.

Wherefore, the Petitioner request this Court to grant him the appropriate relief and the appointment of Counsel.

Respectfully Submitted
Marion C. Brooks

P.O. Box 7[illegible]
Jessup, Md.

Certificate of Service

I hereby Certify that three copys of the foregoing Amended Petitioner was mailed postage paid, to the Chief Judge for the United States District Court, Washington D.C.

Affidavit

2537-68

Marion C. Brooks
Post Office Box 700
Jessup, Maryland 20794

FILED
OCT 11 1968
ROBERT M. STEARNS, Clerk

SS

Marion C. Brooks, being first sworn under oath, presents that I have subscribed to the accoping Petition and does state that the information therein is true and correct to the best of my knowledge and belief.

(S) Marion C. Brooks
Affiant

Subscribed and sworn to before me this ___ day of _____, 19__

(S) _____
Notary Public

My Commission Expires

_____
month day year

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES : 2537-68

vs. : Criminal No. 1394-66

MARION C. BROOKS. :

O R D E R

Upon consideration of Defendant's "Amended Petition for Relief," the same having been treated as a Motion for Release under Title 28, U. S. Code § 2255, the file herein, the Court's trial notes, and the Court finding that there has been no showing of lack of effective assistance of counsel and hence no denial of Defendant's constitutional rights, it is by the Court this 9th day of October, 1968,

ORDERED, that Defendant's Motion be and is hereby denied.

Judge

October 9, 1968

35

In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24694

UNITED STATES OF AMERICA,

Appellee,

v.

MARION C. BROOKS,

Appellant.

BRIEF FOR APPELLANT

THOMAS L. DELANEY, ESQUIRE
1625 Eye Street, N. W.
Suite 622
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the instant 2255 motion represent a "successive application" for "similar relief within the meaning of 28 U.S.C. 2255?

2. Does the denial of a 2255 motion without an evidentiary hearing and without the appointment of counsel, upon the grounds that the files and records before the court conclusively show that the applicant is entitled to no relief constitute an "adjudication on the merits" for purposes of summarily denying a subsequent 2255 application?

3. Did the court below exceed the bounds of judicial discretion by summarily denying, without reaching the merits, appellant's motion to vacate judgment pursuant to 28 U.S.C. 2255?

The conviction of appellant in Criminal No. 1394-66 was reviewed and affirmed by this Honorable Court in Appeal No. 21,011. None of the issues raised by the instant appeal were before this Court in its prior consideration of appellant's conviction.

TABLE OF CONTENTS

CITATIONS

*Cases chiefly relied upon.

In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24694

UNITED STATES OF AMERICA,

Appellee,

v.

MARION C. BROOKS,

Appellant.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia denying appellant's motion pursuant to 28 U.S.C. 2255 to vacate judgment in Criminal No. 1394-66 or in the alternative to modify the petitioner's sentence. Jurisdiction of this Honorable Court to review the denial of appellant's 2255 motion is vested by 28 U.S.C. 2253.

STATEMENT OF THE CASE

The instant appeal arises from the denial of appellant's (hereinafter referred to as "petitioner") pro se motion under 28 U.S.C. 2255 (hereinafter designated "2255 motion") to vacate the judgment entered against the petitioner by the court below in Criminal No. 1394-66 and for other relief.

On September 1, 1970, the court below entered an order denying petitioner's 2255 motion upon a finding that "it considered the same matters when it denied defendant's motion for similar relief on October 9, 1968." This motion and the accompanying documents filed by petitioner together with the court's order denying this motion are set forth in pages 1-20 of the Appendix to this Brief.

The chronology of events in the court below leading up to the denial of the instant motion may be briefly summarized as follows:

Petitioner was indicted on a charge of robbery.[1/] Upon petition to the court below, counsel was appointed to represent petitioner. On April 5, 1967, petitioner was trialed and found guilty of the crime of robbery in Criminal No. 1394-66. Pursuant to this

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1/ D. C. Code 22-2901.

finding, petitioner was sentenced on April 28, 1967 to a term of five to fifteen years.

Petitioner was granted leave to appeal his conviction in Criminal No. 1394-66 in forma pauperis. This Honorable Court appointed counsel to represent petitioner on appeal. The appeal was noted, briefs were filed, oral argument was held, and on November 22, 1967, this Court issued an order affirming petitioner's conviction.

On or about September 30, 1968, petitioner acting pro se filed with the court below a motion captioned "Amended Petition for Relief" (App. 32). In this motion, petitioner alleged twelve separate incidents of claimed ineffective representation of court appointed counsel in Criminal No. 1394-66.[2/] By order dated October 9, 1968,

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2/ "1. Assigned counsel failed to take sufficient time to prepare the case.

"2. Failure of assigned counsel to visit and interview the petitioner sufficiently and to explain the nature of the indictment.

"3. Failure of assigned counsel to file motions for discovery, etc.

"4. Failure of assigned counsel to obtain and offer real evidence.

"5. Assigned counsel disregards [sic] of defendant's instructions.

"6. Incompetency of assigned counsel.

"7. Assigned counsel was prejudice [sic] against the petitioner when he was rearrested in Maryland for conspiracy to rob.

"8. Failure of assigned counsel to interview witnesses in the case.

(continued)

the court below denied petitioner's motion on the grounds that "the file herein, the Court's trial notes, and the Court's finding that there has been no showing of lack of effective assistance of counsel." No appeal was taken by petitioner from this finding.

On January 23, 1969, petitioner filed a second pro se motion with the court below which was captioned "Application for Review of Sentence and the Reduction of Sentence" (App. 25). This motion alleged, inter alia, that the trial judge "discriminat[ed]" against petitioner at the time of sentencing; that the probation officer "discriminat[ed]" against the petitioner; that he was presently incarcerated at the Patuxent Institution pursuant to a conviction of the laws of the State of Maryland; that at Patuxent he was diagnosed as having psychopathic personality disturbances and anti-social reactions.

2/ (continued)

"9. Failure of assigned counsel to investigate the failure of the police to advise petitioner of his rights to an attorney, etc.

"10. Assigned counsel would not file a motion for the petitioner to be examined by a competency [sic] psychiatrist and psychologist.

"11. Failure of assigned counsel to subpoena one of the Government witnesses that [sic] was very important to petitioner's case.

"12. Petitioner also states that the assigned counsel conspired with the government to convict the petitioner" (App. 33-34).

By order dated February 10, 1969, the court below denied this motion on the grounds that the motion was untimely under Rule 35 of the Federal Rules of Criminal Procedure and, further, that the court had "considered many of the same matters raised in the motion when it denied petitioner's Motion for Release under Title 28, United States Code, §2255" (App. 23). No appeal was taken by petitioner from the lower court's denial of this second 2255 motion.

On September 1, 1970, petitioner filed a third pro se motion with the court below (the denial of which is the subject of the instant appeal) styled as follows:

> "MOTION TO VACATE JUDGMENT OR IN THE ALTERNATIVE, MODIFICATION OF PETITIONER'S SENTENCE, SO THE PETITIONER MAY UNDERGO A PSYCHOLGICAL [sic] EXAMINATION AND THE APPOINTMENT OF COUNSEL, PURSUANT TO TITLE 28, §1915 U.S.C., TITLE 28, §2255 U.S.C."

In this motion, petitioner set forth a total of 19 points dealing either with ineffective representation by trial counsel or the general question of petitioner's mental competency at the time of trial.[3/] Appended to this motion were copies of portions of the Maryland Defective Delinquent

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3/ The points contained in petitioner's motion which are germane to the issues before this Honorable Court are as follows:

"1. The counsel for petitioner * * * was ineffective and denied petitioner of due process of law.

"2. The petitioner requested to appointed counsel to file a motion for a psychiatric and psychological examination at St. Elizabeth's Hospital for a mental competency evaluation before trial or for the

(continued)

Statute and a six-page report, apparently prepared by authorities of the Patuxent Institution in the nature of a "workup" on petitioner. This report, in addition to containing the history of both petitioner and his family, sets forth medical and psychiatric histories, summaries of physical, laboratory and psychological examinations,

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3/ (continued) possible criminal behavior or habits. Counsel declined to file such motion.

"3. The petitioner's assigned counsel took it upon himself to diagnose the petitioner's mental condition.

"4. The petitioner's assigned counsel did not have any knowledge or information as to the petitioner's social, physical or mental conditions as well as his history before counsel made his judgment of the petitioner's mental health.

"5. The petitioner's assigned counsel was ineffective and inadequate to make such a professional diagnostic examination himself of the petitioner's mental condition.

"6. The petitioner's assigned counsel made no investigation as to the petitioner's request for observation at the St. Elizabeth's Hospital.

"7. Because of the negligence of the Petitioner's assigned counsel and of his poor judgment of the Petitioner's mental condition, the Petitioner is confined at the Lorton Complex, which does not provide adequate psychiatric and psychological care.

"8. Because of the negligence of the Petitioner's assigned counsel to file motion for examination as to the Petitioner's mental condition, the Petitioner was arrested on his release on bail approximately two (2) and a half months later in the State of Maryland for the crimes of: (1. Assault with intent to murder, 2. Assault and Battery, 3. Carrying a concealed weapon, and 4. Conspiracy to Robbery [sic] with a dangerous and deadly weapon.)

"9. Upon the petitioner's confinement in the State of Maryland, the petitioner was sent to the Patuxent Institution at the request of the Trial Judge for examination as a 'Defective Delinquent' under Article 31-B, Annotated Code of Maryland. See petitioner's Exhibit No. 1.

(continued)

petitioner's current "mental status", psychiatric diagnosis, and finally, an opinion that petitioner fulfills the requirements of being a defective delinquent (App. 10-20).

By order dated September 1, 1970,[4] petitioner's motion was denied by the court below on a finding that "it [the court] considered the

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3/ (continued)

"10. The petitioner was evaluated by the staff of the Patuxent Institution and was found to be a 'Defective Delinquent'. Read Exhibit No. 1.

"11. The mere fact that the petitioner was evaluated and found to be a 'Defective Delinquent' by the staff of that institution in Jessup, Maryland, points out the 'ineffectiveness' of petitioner's assigned counsel in diagnosing the petitioner's mental condition.

"12. See petitioner's psychological report and evaluation of his mental condition in Exhibit No. 2.

"13. The facts concerning petitioner's mental health plainly show the petitioner is suffering from a disease. Read petitioner's Exhibit No. 1 and 2.

"14. The petitioner's evaluation as a 'Defective Delinquent' came about through a thorough examination given by Dr. Harold M. Boslow, M.D., Director, Patuxent Institution; Mr. Junesik N. Yong, M.D., Psychiatrist III, Mr. Louis M. Florenzo, Psychologist and Domingo C. Sorongon, M.D.

* * *

"18. The petitioner states that under the Defective Delinquent Statute, Article 31-B, Annotated Code of the Public General Laws of Maryland, the petitioner is a 'Defective Delinquent' and should be confined to a mental institution.

"19. The petitioner states that he is mentally sick and should be confined in St. Elizabeth's Hospital or any appropriate mental hospital that would provide adequate psychiatric care and treatment for petitioner"(App. 4). [Editorially Corrected]

4/ Official Docket indicates order dated September 2, 1970, denying petitioner's motion.

same matters when it denied defendant's motion for similar relief on October 9, 1968" (App. 1).

STATUTE INVOLVED

28 U.S.C. 2255, as amended, provides as follows:

"§2255. Federal custody; remedies on motion attacking sentence

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

SUMMARY OF ARGUMENT

The lower court denied the instant 2255 motion on the grounds that it represented a successive application for relief previously denied upon the occasion of petitioner's first 2255 application.

The first 2255 motion, alleging ineffective representation of counsel in violation of petitioner's constitutional rights, was denied without a hearing and without the appointment of counsel. The instant or third 2255 motion alleges both ineffective representation of counsel and mental incompetency at the time of trial.

The Supreme Court in Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068 (1963), set down three definitive guidelines controlling the disposition of successive 2255 motions for federal collateral relief: first, the motion may not be summarily denied on the basis of a prior 2255 application, if the motion raises a "new ground" for relief; or, second, if the motion sets forth a ground which, although previously raised was "not adjudicated on the merits"; or, third, the "ends of justice" require a reconsideration of the grounds set forth in the new application although the grounds were previously adjudicated on the merits adversely to the petitioner.

It is settled law in this jurisdiction that ineffective representation of counsel and mental incompetency at the time of trial represents separate and distinct grounds for relief. Smith v. United States, 106 U.S.App.D.C. 169, 270 F.2d 921 (1959). The lower court's denial of the instant 2255 application which set forth a "new ground" for relief was, therefore, in violation of Sanders.

Even assuming arguendo that petitioner's third 2255 motion did not raise a new ground within the meaning of Sanders, it was improperly denied as a successive application since the prior disposition did not represent an "adjudication on the merits" within the guidelines set down in Sanders.

In Tucker v. United States, 138 U.S.App.D.C. 345, 427 F.2d 615 (1970), this court considered the "adjudication on the merits" exception to the 2255 hearing requirement. It was held that there could be no "adjudication on the merits" of a 2255 application, absent the holding of a hearing and the appointment of counsel, neither of which were present in the denial of petitioner's first 2255 application.

For either or both of the above reasons, the court below erred in summarily denying petitioner's third 2255 motion without a consideration of the merits.

ARGUMENT

I.

PETITIONER'S PRIOR 2255 APPLICATION WAS PREMISED UPON DIFFERENT AND DISTINCT "GROUNDS" THAN THE INSTANT MOTION.

The subject matter of the instant appeal represents the lower court's denial of petitioner's 2255 motion for federal collateral relief -- the third in a series of 2255 applications or motions which were treated by the court below as being in the nature of a 2255 application.

Both the most recent 2255 motion, and the directly preceding or "second" 2255 application were denied by the court without a determination on the merits. The lower court's order denying the instant motion

premised the decision upon the fact that it had considered the same matters when it denied petitioner's motion for similar relief on October 9, 1968. Apparently, this denial was pursuant to the statutory 2255 proviso that the

> "Sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same petitioner." 5/

Similarly, petitioner's second 2255 motion was denied on the grounds that the court had "considered many of the same matters now raised when it denied defendant's motion under * * * Section 2255 on October 9, 1968." 6/

Petitioner's first motion for federal collateral relief filed on or about September 30, 1968, and styled "Amended Petition for Relief" was treated by the court below as a "Motion for Relief" under 2255. The thrust of this petition was directed at the violation of petitioner's constitutional rights by virtue of ineffective representation by court appointed trial counsel. 7/

5/ 28 U.S.C. §2255.

6/ The court also based its decision, at least in part, on the fact that petitioner's application was untimely under Rule 35 of the Federal Rules of Criminal Procedure (App. 23).

7/ See note 3, supra, (App. 4).

On October 9, 1967, the court below "upon consideration of Defendant's * * * Petition * * *, the file herein, the Court's trial notes" denied petitioner's 2255 application (App. 23).

Petitioner submits that the threshold question before this court is whether the court below could summarily dispose of petitioner's third motion for collateral relief under 2255 solely upon the grounds that the court had previously denied a motion "for similar relief."

The Supreme Court directly confronted this question in Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068 (1963):

> "We consider here the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U.S.C. 2255." 373 U.S. 1 at 3.

The court in Sanders considered the propriety of a District Court's denial of a second or "successive" 2255 motion for collateral relief from a conviction of robbery. The first 2255 motion in Sanders had been denied by the lower court on the grounds that the motion set forth no facts upon which ultimate legal conclusions could be based. Although the lower court noted that on these grounds alone the motion could be denied without a hearing, the court also went on to find that the 2255 charges were completely refutiated by the files and records of the case before the court.

The second or successive 2255 motion submitted pro se before the court in Sanders alleged that petitioner was mentally incompetent at the time of trial. The District Court, without a hearing, denied this motion upon the grounds that the incompetency question should have been raised in the first 2255 motion. This denial was affirmed by the Ninth Circuit Court of Appeals. The stage was thus set for the high court's consideration of the question.

In reversing the lower court's denial of Sanders' second 2255 motion, the Supreme Court reaffirmed the basic rule that a petitioner shall be granted a hearing on a 2255 motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case conclusively show that the claim is without merit.

As to the operative implications of the 2255 proviso that "the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner", the court laid down three criteria, each of which must be satisfied before controlling weight could be given to a denial of a prior 2255 application:

> "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application,
>
> "(2) the prior determination was on the merits, and

> "(3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15.

The court then examined in detail each of these criterion. As to the lower court's determination of whether the "same ground" was in fact presented in a subsequent 2255 motion determined adversely to the applicant, the court stated

> "By 'ground' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on an alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also identical grounds may often be supported by different legal arguments * * *." 373 U.S. at 16.

A review of the petitioner's third 2255 motion reveals that two distinct "grounds" for federal collateral relief from his conviction in Criminal No. 1394-66 were raised: the first, that he was denied effective representation of counsel by virtue of his court appointed counsel's failure to file a pretrial motion for a psychiatric examination of petitioner; and second, that petitioner was in fact mentally incompetent at the time of his trial.

In support of the claim of ineffective representation of counsel, petitioner alleged, inter alia, that court appointed trial counsel failed either to heed petitioner's request to file a pretrial motion for psychiatric examination or to investigate the underlying basis for petitioner's request for a mental examination.

An examination of petitioner's first 2255 motion reveals twelve specific assignments of alleged instances of ineffective representation of counsel including counsel's failure to file a pretrial motion for a psychiatric examination of petitioner (App. 32).

Assuming the other two criteria laid down by the Supreme Court in Sanders were satisfied (i.e., "adjudication on the merits" and the "ends of justice"), the court below could have appropriately denied petitioner's third 2255 motion on the basis of that court's prior denial of the first 2255 motion if no additional grounds were proffered in the succeeding motion.

However, the third 2255 motion did set forth an additional ground for federal collateral relief -- that of mental incompetency at the time of trial.[8/]

8/ It is settled in this jurisdiction that the question of incompetency at the time of trial is appropriate grounds for relief under 28 U.S.C. 2255. Bishop v. United States, 96 U.S.App.D.C. 117, 223 F.2d 582 (1955), vacated 350 U.S. 961, 76 S.Ct. 440; Lloyd v. United States, 101 U.S. App.D.C. 116, 247 F.2d 522 (1957).

Specifically, petitioner alleged that as a direct result of court appointed counsel's failure to secure a pretrial examination, he was arrested by Maryland authorities while on bail pending disposition of the federal charges, convicted by a Maryland court and committed to the Maryland facility at Patuxent for examination. While at Patuxent, he was diagnosed, inter alia, as having psychopathic personality disturbances and anti-social reactions (App. 18). In point of time, petitioner was transferred to Patuxent by Maryland authorities for examination on March 7, 1968, or approximately 12 months after his conviction by the court below in Criminal No. 1394-66.

Petitioner further alleges in the third 2255 motion that "the facts (psychological and psychiatric findings appended to the body of the motion)[9/] concerning petitioner's mental health plainly show the petitioner is suffering from a disease" and further that "the petitioner states he are [sic] mentally sick and should be confined in St. Elizabeth's Hospital" (App. 6).

9/ "Psychological Examination:

"Psychological examination done on June 17, 1968, indicated in its summary:

> 'In summary, this patient, of dull-normal intelligence, is an immature, emotionally deprived, poorly motivated individual with few internal resources to control his destructive acting out. He is self-centered and hedonistic, and gives little thought to the consequences of his behavior. He shows no remorse for harm he has done to others. He is thus a danger to others and meets the definition of a Defective Delinquent'" (App. 18).

Although the thrust of these allegations may have been directed to a buttressing of petitioner's "ground" that his trial counsel was "ineffective" as a result of his failure to file a pretrial motion for psychiatric examination, their collective import also clearly points in the direction of a claim by petitioner that he was, in fact, mentally incompetent at the time of trial.

Petitioner is a high school dropout who, although possessing a lengthy history of incidents with criminal authorities, cannot be presumed to possess sufficient legal accume to accurately frame constitutional questions -- a fortiori, especially when acting without the benefit of legal counsel. It is submitted that an objective appraisal of the totality of the allegations set forth in petitioner's third 2255 motion compells the conclusion that petitioner, regardless of the ultimate reason, is raising the question of his mental competency at the time of trial.

As the Supreme Court noted in this respect

> "Should doubts arise in a particular case as to whether two grounds are different or the same, they should be resolved in favor of the applicant." Sanders v. United States, supra, 373 U.S. at 16.

Further,

> "An applicant for such relief ought not be held to the niceties of lawyers' pleadings or be cursorily dismissed because his claims seem unlikely to prove meritorious." Id. at 22.

Although antedating Sanders, this court in Smith v. United States, 106 U.S.App.D.C. 169, 270 F.2d 921 (1959), put to rest the question of whether the allegation of incompetency at the time of trial represents an application for "the same or similar relief" within the meaning of 2255 as a prior application "based upon ineffective representation of counsel." The majority opinion written by Circuit Judge Fahy stated, inter alia,

> "As I interpret the statutes, the motion alleging incompetency at the time of trial was not for relief similar to that sought in the earlier motion alleging ineffectiveness of counsel. Accordingly, the motion should have been entertained." 106 U.S.App.D.C. at 172, 270 F.2d at 924.

As to the underlying factors considered in reaching the above-quoted conclusion, this court in Smith went on to distinguish the difference between "grounds" for a 2255 application and the "relief" which may be afforded should that 2255 motion prove successful.

> "* * * §2255 motion is required to be entertained by the sentencing court when it presents ground 'not theretofore presented and determined.' This is a 'new ground' which prevents the motion from being one for 'similar relief.' This is so although the ultimate relief sought may be said to be similar in the sense that the second motion, like the earlier one seeks a new trial or vacation or correction of sentence. Such relief is not deemed similar if sought upon a dissimilar ground of collateral attack." 106 U.S.App.D.C. 173, 270 F.2d 921 and 925.

So too, this court speaking through Chief Judge Bazelon in Tucker v. United States, 138 U.S.App.D.C. 345, 427 F.2d 615 (1970) reaffirmed the controlling principles governing the denial of a 2255 motion for post conviction relief. As to the question of grounds for relief, this court stated that a subsequent 2255 motion could only be denied, assuming the other criterion set down in Sanders were satisfied

> "if the grounds for relief relied upon were previously determined, on the merits, adversely to the applicant after an adequate hearing * * *." 138 U.S.App.D.C. at 347, 427 F.2d at 617.

Should this court find the question of mental incompetence at the time of trial to be adequately framed in petitioner's third 2255 motion, the trial court's denial of this motion on the grounds that it represents "a successive application for similar relief" must be reversed.

Conceivably, but doubtfully, the lower court could have denied petitioner's motion raising the question of mental competency at the time of trial on the grounds that the files and records available to the court conclusively showed that petitioner was entitled to no relief. However, the court below did not undertake this evaluation but rather chose to premise its finding upon its prior denial of petitioner's first 2255 motion which did not raise the question of mental competency.

II.

THE LOWER COURT'S DENIAL OF PETITIONER'S FIRST 2255 MOTION ON THE GROUNDS THAT THE "FILES AND RECORDS BEFORE THE COURT DID NOT REPRESENT A DETERMINATION ON THE MERITS."

As set forth under section I, supra, petitioner submits that two separate grounds for federal collateral relief were raised by petitioner's third 2255 motion (the denial of which is now before this court): first, ineffective representation by court appointed counsel; and second, mental incompetency at the time of trial.

Petitioner submits, as set forth above, that the ground of incompetency at the time of trial represents a "new ground" not previously considered by the court below and, on that basis alone, the lower court's summary denial of the third 2255 motion on the basis of that court's prior denial of petitioner's first 2255 motion was erroneous.

However, petitioner further submits that the court's denial of petitioner's first 2255 claim for relief based upon ineffective representation of counsel was not "a determination on the merits" and, therefore, did not afford the lower court discretion to summarily deny that ground when raised in petitioner's third 2255 motion.

In this respect, the second criterion laid down by the Supreme Court in Sanders, supra, also required to be answered in the affirmative

before controlling weight may be afforded to the denial of a prior 2255 application is that the "prior determination was on the merits." By this the court meant that

> "The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. (citation omitted) This means that if actual issues were raised in prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held." Sanders v. United States, supra, 373 U.S. at 16.

The question is thus framed as to whether a denial of a preceding 2255 motion (assuming, arguendo, that it raised the same ground as the subsequent or successive 2255 motion) on the grounds that the files and records before the court conclusively show that petitioner's claim is without merit represents an "adjudication on the merits" when entered without the benefit of either evidentiary hearings or appointment of counsel.

This court in Tucker v. United States, 138 U.S.App.D.C. 345, 427 F.2d 615 (1970) had recent occasion to discuss the discretionary exceptions to the hearing requirement of 2255 set down by the Supreme Court in Sanders. In Tucker, the appellant was convicted of both a capital and several associated offenses. Subsequent to the affirmance by this court of Tucker's conviction, he filed pro se a series of 2255

motions for post conviction relief,[10] all of which were denied without a hearing and without appointment of counsel by the trial court.

This court stated, inter alia, that a motion for post conviction relief may be denied without a hearing only when the grounds for relief relied upon were previously determined on the merits adversely to the applicant after an adequate hearing.

10/ The decision of this court in Tucker does not reveal the basis of the lower court's summary denial of Tucker's series of 2255 motions. However, the decision does reference the only reported opinion "regarding his (Tucker's) labors" which was in the form of a petition for rehearing en banc. Tucker v. United States, 120 U.S.App.D.C. 23, 343 F.2d 305 (petition for rehearing en banc), cert. denied 381 U.S. 952, 85 S.Ct. 1812.

Although the petition was dismissed, a vigorous dissent by the Chief Judge noted that the trial judge in denying Tucker's 2255 motion held that "the objections to admissability of evidence at his trial are not cognizable on a motion under 28 U.S.C. 2255."

Whether or not the lower court's denial of Tucker's successive 2255 motion eventually to be reversed by this court (Tucker v. United States, 138 U.S.App.D.C. 345, 427 F.2d 615 (1970)) was denied on the same basis as his previous motion is unknown.

In applying this requirement to the facts before it in Tucker, this court reversed the lower court's denial and found that

> "None of the discretionary exceptions to the hearing requirement is applicable to the present case. The merits of appellant's claims were not reached on direct appeal from his conviction. His previous pro se motions for relief were denied without either a hearing or the appointment of counsel. Denial of a motion for relief without a hearing cannot be taken as a denial on the merits for the purpose of determining whether a subsequent application based on the same ground may be summarily denied * * *." (Emphasis added) 138 U.S.App.D.C. at 347, 427 F.2d at 617.

This court went on to note that it was doubtful that even a full hearing on the merits may be deemed "adequate" for purposes of satisfying the requirements of Sanders, supra, if the petitioner was "through no fault of his own, not represented by counsel." However, this court pointed out that this statement did not mean that the filing of every 2255 motion required the appointment of counsel but that

> "The point is only that if the prior application was disposed of without the appointment of counsel, a subsequent application must be considered on its own merits and not summarily disposed of on the basis of a previous denial." 138 U.S.App.D.C. at 347, note13, 427 F.2d at 617, note 13.

It is clear from the record now before the court in these proceedings that petitioner's first 2255 motion was denied without a hearing

and without the appointment of counsel on the grounds that the files and records then before the court showed petitioner's claim to be without merit. It is also abundantly clear that petitioner's third 2255 motion, now before this court, was denied, without the benefit of either counsel or hearing, on the basis of being a successive motion for similar relief.

Petitioner would stress at this time that he is not asking this court to consider the legal sufficiency of the grounds set forth in his third 2255 motion -- this is properly the task of the court below. However, petitioner would ask this court to reject the lower court's denial of the instant 2255 application in view of the fact that this denial was based upon a prior 2255 denial which was summary in nature (without the benefit of either hearing or appointment of counsel) and could not, for the purposes of Sanders, represent "an adjudication on the merits."

Under the rules laid down by this court in Tucker, the court below possessed no discretion to decline to reach the merits of petitioner's instant 2255 motion. Conceivably, the court below could have denied the instant petition on the grounds that the files and records before the court conclusively showed petitioner's application to be without merit. Rather, the court chose to deny the petition as repetitious.

CONCLUSION

The court below erred in denying the instant 2255 application on the grounds that it represents a successive motion for similar relief in view of the fact that: (1) the instant motion raised a new ground for federal collateral relief -- incompetency at the time of trial -- not previously considered by the court below; and (2) the disposition of petitioner's prior 2255 application was not an "adjudication on the merits."

WHEREFORE, appellant respectfully requests this court to reverse and remand these proceedings to the trial court with instructions to consider the merits of appellant's application for relief and for such other relief as this court in its judgment deems appropriate.

Respectfully submitted,

By_____

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Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,694

UNITED STATES OF AMERICA, APPELLEE

v.

MARION C. BROOKS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
WILLIAM H. SCHWEITZER,
Assistant United States Attorneys.

Cr. No. 1394-66

INDEX

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether appellant was entitled to a hearing on his § 2255 petition?

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* This case was previously before this Court on direct appeal from appellant's conviction. *Brooks* v. *United States*, No. 21,011. The instant appeal is taken from a denial of a motion under 28 U.S.C. § 2255.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,694

UNITED STATES OF AMERICA, APPELLEE

v.

MARION C. BROOKS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed December 5, 1966, appellant was charged with robbery (22 D.C. Code § 2901). Trial commenced before the Honorable Aubrey E. Robinson, Jr., and a jury on April 5, 1967, and ended the same day with a verdict of guilty as charged. On April 27, 1967, appellant was sentenced to imprisonment for a term of five to fifteen years. On appeal this Court affirmed the judgment of the District Court. *Brooks* v. *United States*, D.C. Cir. No. 21,011, decided November 22, 1967.

Appellant filed *pro se* in October of 1968 an "Amended Petition for Relief" in which he asked the trial court to vacate his sentence. The trial court treated the petition as a motion under 28 U.S.C. § 2255 and on October 9, 1968, denied it.[1] See appellant's Appendix (App.) at 31-35. Appellant filed a second *pro se* motion[2] on January 23, 1969, which was also treated as a motion to vacate sentence under 28 U.S.C. § 2255. The court denied this motion on February 10, 1969.[3] Appellant's final *pro se* motion was filed on September 1, 1970,[4] and denied by the court the same day.[5] From that denial appellant has brought this appeal.

The Trial

On November 8, 1966, Mrs. Florence Louise Steele was the proprietor of Flo's Custom Cleaners at 3933 Georgia Avenue, Northwest (Tr. 17). At approximately 9:05 a.m. a man came to the door and asked Mrs. Steele to let him enter the store (Tr. 18).[6] Mrs. Steele let him in. The man claimed that he had some clothes to pick up but said he had lost his ticket (Tr. 18, 20). Mrs. Steele checked her record book and could not find the man's name (Tr. 20). The man then put his hand into his right coat pocket

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[1] The trial court denied appellant a hearing after examining the file and the Court's own trial notes (App. 35).

[2] This motion was entitled "Application for Review of Sentence and the Reducetion [*sic*] of Sentence."

[3] The stated reason for the denial was that the motion was untimely under Rule 35, FED. R. CRIM. P., and that the court had already considered the issues raised in the first motion (App. 23).

[4] This motion was styled "Motion to Vacate Judgment or in the Alternative, Modification of Petitioner's Sentence, So the Petitioner May Undergo a Psychological Examination and the Appointment of Counsel, pursuant to Title 28, Section 1915 U.S.C., Title 28, Section 2255 U.S.C."

[5] The court determined that it had considered the same matters when it denied appellant's first motion on October 9, 1968 (App. 1).

[6] Mrs. Steele normally kept the front door locked and would open it only when a customer approached (Tr. 20).

and demanded that Mrs. Steele give him her money (Tr. 20). After Mrs. Steele opened the cash register, she was pushed by the man to the rear of the store (Tr. 21). As she was being pushed to the back, a second man appeared and entered the store (Tr. 21). Mrs. Steele did not get a good view of the second man, but she did remember that he was wearing a checkered hat and that he asked her where she had put her pocketbook (Tr. 21). Mrs. Steele told the second man that her pocketbook was in the window seat. The second man took her wallet from the pocketbook, and shortly thereafter all the men left (Tr. 21-22).[7] Immediately after they went out the front door, Mrs. Steele ran outside and shouted that she had been robbed (Tr. 22).[8]

Officer Moses E. Brewington, a police trainee at the time, was getting a haircut in the barber shop one door away from Mrs. Steele's cleaning shop (Tr. 35-36, 46-47).[9] When Mrs. Steele shouted that she had been robbed, Officer Brewington and the barber ran out of the shop and saw two men turning the corner on Randolph Street (Tr. 37, 47).[10] The officer and the barber ran to the barber's car, and the two proceeded west on Randolph Street and south on Tenth Street until they saw the two men "trotting" down Tenth Street (Tr. 37, 47-48).[11] Officer Brew-

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[7] The robbers had taken $16.75 from the register, between $25 and $27 from Mrs. Steele's billfold, and $14.75 in change from an unidentified place (Tr. 23-25).

[8] Mrs. Steele last saw the men running south on Georgia Avenue (Tr. 22).

[9] The barber shop and cleaner were located on Georgia Avenue between Randolph and Shepherd Streets, Northwest (Tr. 47).

[10] When Officer Brewington first observed the two men, one was wearing a long black coat, and the other was wearing a long white coat. When he saw them again on Tenth Street, they had discarded their outer garments (Tr. 50, 59). The officer thought that they had hats on when he first saw them, but he could not be positive (Tr. 59).

[11] Approximately three to four minutes elapsed between the time they saw the men turning the corner on Randolph Street and the confrontation on Tenth Street.

ington got out of the car and identified himself as a police officer (Tr. 37). The two men ran from the officer and headed east toward the Raymond School playground (Tr. 38, 47). When they reached the playground, they split up (Tr. 38, 48). Officer Brewington went around the school building and saw one of the men, whom he identified as appellant, lying in some bushes about twenty feet from the building (Tr. 38-39, 48). The officer arrested appellant [12] and searched him (Tr. 39-40). The search revealed that appellant had Mrs. Steele's wallet in his back pocket (Tr. 24-25, 40-43) as well as $51.55 in bills and change (Tr. 42-43).

A motorcycle policeman went over the escape route and recovered two checkered hats, one long black coat and one long white or tan coat, and a gun which was in the pocket of one of the coats (Tr. 49-65). The testimony of the motorcycle officer was stipulated by counsel (Tr. 65).

At a lineup held at the precinct about twenty minutes to a half-hour after the robbery, Mrs. Steele was unable to identify appellant (Tr. 22-23, 27-34). In fact, she chose the wrong man in the lineup (Tr. 28-34).

Appellant testified that he was standing at the corner of Georgia Avenue and Shepherd Street when a man ran by him and a wallet dropped out of his pocket (Tr. 69-72). Appellant heard two shots and immediately raced to the playground and dived into some hedges (Tr. 72-74). He admitted that he had the wallet and money in his possession when he was arrested by Officer Brewington (Tr. 74-75). His excuse for having some bills and change in his pocket was that he had won a lot of money in a poker game that night with some of his fellow employees at the Smithsonian Institution (Tr. 74-76).[13]

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[12] Officer Brewington tesitfied that he had drawn his service revolver on Tenth Street but never fired it (Tr. 45-46).

[13] Appellant testified that he had been working at the Smithsonian for about six months at the time of the robbery (Tr. 80). He also said that eleven of his fellow employees were in the poker game that night, but he could name only four of them (Tr. 80-82).

ARGUMENT

The records and files conclusively show that the District Court properly denied appellant's third § 2255 petition.

(Tr. 1-145)

Appellant's contention is that the trial court erred in denying his third § 2255 petition without holding a hearing. Appellant asserts that only one issue, that of ineffective assistance of counsel, was raised in his first *pro se* petition and that two issues, ineffective assistance and mental incompetency at the time of trial, were raised in the third petition.

We submit that the trial court was duly alerted by appellant's first petition to the claims which appellant allegedly raised in his third. Appellant acknowledges that one of his complaints in his first petition was that his counsel failed to file a pretrial motion for a psychiatric examination: [14]

> An examination of petitioner's first 2255 motion reveals twelve specific assignments of alleged instances of ineffective representation of counsel including counsel's failure to file a pretrial motion for a psychiatric examination of petitioner. (Brief for Appellant at 16.)

The trial court examined the files of the case and the court's own notes and found that there was no ineffective assistance of counsel (App. 35.)

The third petition raised the same issues that were raised in the first petition, namely ineffective assistance of counsel in general and failure of appellant's trial counsel to move for a pre-trial psychiatric and psychological examination of appellant (App. 5-6). In fact, appellant

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[14] Clause ten of appellant's first § 2255 petition states the following: "Assigned counsel would not file a motion for the petitioner to be examined by a competency psychiatrist and psychologist." (App. 32.)

concluded his third petition with a reaffirmation of those two issues:

> I, *Marion C. Brooks*, respectfully states that my trial counsel's failure to have filed a pre-trial motion for me to undergo a psychiatric and psychological examination violated my constitutional right to due process of law and had thereby rendered his representation as my trial counsel, ineffective to the point of depriving me of counsel under the Constitutional Sixth (6) Amendment right, and a denial of Due Process of Law under the Constitutional Fifth (5) Amendment Rights (App. 6).

Appellant's third petition, after the first two paragraphs,[15] presented a description of his mental condition, including voluminous materials concerning appellant's designation as a defective delinquent by the Maryland authorities. 3 MD. CODE ANN. Art. 31B, § 5 (1971).[16] Appellant's designation as a defective delinquent[17] did not occur until June 17, 1968, well over a year after his trial in the District of Columbia (App. 11-12). In fact, under Maryland law a person cannot be examined in order to determine defective delinquency unless he had been convicted of serious crime. *See* 3 MD. CODE ANN. Art. 31B, § 6 (a) (1971); *Director of Patuxent Institution* v. *Daniels*, *supra* note 17, 243 Md. at 39, 43, 221 A.2d at 411, 413. The test of competency to stand trial was set forth by the Supreme Court in *Dusky* v. *United States*, 362 U.S. 402 (1960):

> [T]he test must be whether [the accused] has sufficient present ability to consult with his lawyer with

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[15] The first two paragraphs declare that appellant's trial counsel was generally ineffective and that appellant asked his counsel to file a pre-trial motion for a psychiatric and psychological examination and his counsel failed to do so (App. 4-5).

[16] Appellant informed the court in his second petition that he was institutionalized at the Patuxent Institution by the Maryland authorities and that their psychiatric diagnosis was "Sociopathic Personality Disturbances, Antisocial Reaction." (App. 28.)

[17] *See also Director of Patuxent Institution* v. *Daniels*, 243 Md. 16, 35-36, 221 A.2d 397, 408-409, *cert. denied*, 385 U.S. 940 (1966).

> a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.[18]

The mere fact that there may be something wrong with a defendant, or that he may be emotionally unstable, does not necessarily render him mentally incompetent to stand trial. *Lebron* v. *United States*, 97 U.S. App. D.C. 133, 229 F.2d 16 (1955), *cert. denied*, 351 U.S. 947 (1956).

The trial court clearly had to consider appellant's competency to stand trial in determining whether appellant's counsel rendered him ineffective assistance. Appellant raised the issue in his first petition (App. 32). His third petition made a similar claim of ineffective assistance of counsel, one of the bases for the claim being that appellant's counsel never made a motion for an examination in order to determine whether appellant was mentally competent to stand trial (App. 4-5).[19] We submit that the District Judge properly denied appellant's third petition on the grounds that he had already considered those issues in the first petition. *Sanders* v. *United States*, *supra* note 19, 373 U.S. at 15-19; *see* 28 U.S.C. § 2255.[20]

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[18] *Cf. Pate* v. *Robinson*, 383 U.S. 375 (1966).

[19] Appellant knew that he had been designated a defective delinquent prior to the filing of his first petition (App. 11-12). He informed the court that he was in the Patuxent Institution in his second petition (App. 28), and yet he waited until he filed his third petition, three and a half years after his conviction, two and a half years after his designation as a defective delinquent and two years after the filing of his first petition, to provide the court with the voluminous defective delinquency information. Appellant's withholding of the defective delinquency information until the third petition was an abuse of the remedy offered by 28 U.S.C. § 2255. *Cf. Sanders* v. *United States*, 373 U.S. 1, 17-22 (1963); *Price* v. *Johnston*, 334 U.S. 266 (1947); *Wong Doo* v. *United States*, 265 U.S. 239 (1924).

[20] Appellant testified at the trial and presented an adequate defense (Tr. 68-69). He withstood a strong cross-examination by the prosecutor (Tr. 76-93). There is nothing in the transcript to indicate that either the judge, the prosecutor or defense counsel had any reservations about appellant's mental competency at time of trial (Tr. 1-145).

The trial court, after examining the records and files of the case, made a determination on the merits [21] that appellant's claims had no basis. Appellant's having been found a defective delinquent in Maryland clearly does not affect the trial court's initial determination of competency when considering the first § 2255 motion, since the standards for mental competency and defective delinquency are not related.[22] The denial of the third petition by the trial court without a hearing was proper.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
WILLIAM H. SCHWEITZER,
Assistant United States Attorneys.

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[21] The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. [Citation omitted.] This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held. *Sanders* v. *United States*, *supra*, 373 U.S. at 16.

In this case the files and records conclusively resolved the issue raised in the first petition, and the third petition raised no new issue. *But see Tucker* v. *United States*, 138 U.S. App. D.C. 345, 427 F.2d 615 (1970).

[22] A defective delinquent is defined as:

> an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. 3 MD. CODE ANN. Art. 31B, § 5 (1971).

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